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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

v.

LARRY D. JONES,

Appellee.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF THE APPELLEE LARRY D. JONES

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TABLE OF CONTENTS

Page

OPINION BELOW 1

ADDITIONAL STATUTES INVOLVED 2

QUESTIONS PRESENTED FOR REVIEW 7

STATEMENT OF THE CASE 7

SUMMARY OF THE ARGUMENT 12

ARGUMENT:

I. AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER 15

II. A PRISONER HAS A PROTECTED LIBERTY INTEREST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS 24

III. AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS 37

CONCLUSION 41

TABLE OF AUTHORITIES

Cases:

Addington v. Texas,
___ U.S. ___ 60 L.Ed. 2nd 323 (1979) 28

Baxstrom v. Herold,
383 U.S. 107 (1966) ..... *passim*

Chesney v. Adams,
377 F. Supp. 887 (D. Conn. 1974)..... *passim*

Doremus v. Farrell,
407 F. Supp. 509 (U.S.D.C. Neb. 1975) 19

Drope v. Missouri,
420 U.S. 162 (1975) 32

Enomoto v. Wright,
Aff. w/o opinion, 434 U.S. 1052 (1978) 22

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 21

Goldberg v. Kelly,
397 U.S. 254 (1970) 22

Greenwood v. U.S.,
350 U.S. 366 (1956) 32

Heryford v. Parker,
396 F.2d 393 (10th Cir. 1968) 39,40

In Re Ballay,
482 F.2d 648 (D.C. Cir. 1973)..... 28

In Re Gault,
387 U.S. 1 (1967) 26,39

Lessard v. Schmidt,
349 F. Supp. 1078 (E.D. Wisc. 1972).....39

Matthews v. Eldridge,
424 U.S. 319 (1976) 13,22

Matthews v. Hardy,
420 F.2d 607 (1969)..... 20,27,41

Meachum v. Fano,
427 U.S. 215 (1976) ..... *passim*

Montanye v. Haymes,
427 U.S. 236 (1976) 12,16,17,18,22

Morrissey v. Brewer,
408 U.S. 471 (1972) 21,24,25,38

O'Connor v. Donaldson,
422 U.S. 563 (1975) 14,25,32

Specht v. Patterson,
386 U.S. 605 (1967) 25,26

U.S. ex. rel. Schuster v. Herold,
410 F.2d 1071 (2nd Cir. 1969)..... *passim*

Vitek v. Miller,
436 U.S. 407 (1978) 11

Wolff v. McDonnell,
418 U.S. 539 (1974) 21,22,24,38

STATUTES

Mass. Gen. L. Annot. 97 (1974) 17

Neb. Rev. Stats. § §81-101-102 (Reissue 1976) 9

Neb. Rev. Stat. §83-180 (Reissue 1976)..... *passim*

Neb. Rev. Stat. §83-173 (Reissue 1976).....10

Neb. Rev. Stat. §83-176 (Reissue 1976)..... 10,19,25

Neb. Rev. Stats. § §83-1001-1078 (Cum. Supp. 1976)..... 2-7,19,41

CONSTITUTION

Constitution of the United States, Fourteenth Amendment 24

TEXTS

Commission on Accreditation for Corrections of the American Correctional Assoc., *Manual of Standards for Adult Correctional Institutions,* August 1977, Standards for Medical and Health Care Services Nos. 4275 and 4277..... 33,34

Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974) 32,33

Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977) 25

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.13, 16.12 ..... *passim*

The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 86-104 (1976) 25

Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445 (1977) 25

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OPINION BELOW

The opinion of the United States District Court for the District of Nebraska is reported in 437 F. Supp. 569, (1977).

The re-entry of the original judgment on October 27, 1978 is unreported.

ADDITIONAL STATUTES INVOLVED

The Nebraska Mental Health Commitment Act

Neb. Rev. Stats. §§83-1001-1078 (Cum. Supp. 1976)

83-1001. Declaration of purposes.
83-1002. Sections; terms defined.
83-1003. County attorney; defined.
83-1004. Mental health board; defined.
83-1005. Director; defined.
83-1006. Mental health center; defined.
83-1007. State hospital; defined.
83-1008. Indigent; defined.
83-1009. Mentally ill dangerous person; defined.
83-1010. Mental health professional; defined.
83-1011. Peace officer; defined.
83-1012. Petitioner; defined.
83-1013. Sheriff; defined.
83-1014. Subject; defined.
83-1015. Jail; defined.
83-1016. Clerk of the district court; duties relating to mental health board.
83-1017. Mental health board for each country; created; powers.
83-1018. Mental health board; members; terms; qualifications; vacancy; alternate members; quorum; chairperson.
83-1019. Facility or programs for treatment of mental illness; voluntary admission; unconditional discharge; exception.

83-1020. Mentally ill dangerous person; custody prior to mental health board proceedings; where detained.
83-1021. Individual taken into custody; peace officer; execute certificate; contents.
83-1022. Mental health board proceedings; when commenced; petition; certificate; subject, notified of rights.
83-1023. Subject admitted by certificate; evaluated; decision; discharged from custody; when.
83-1024. Person believes another to be a mentally ill dangerous person; notify county attorney; petition; when.
83-1025. Petition; contents; filed; where; transfer of proceedings.
83-1026. Petition; verified; county attorney statement; emergency custody under certificate; effect; how entitled; dismissal; when.
83-1027. Petition; immediate custody not required, summons; final or preliminary hearing; sheriff; duties; failure to appear; warrant for custody.
83-1028. Petition; immediate custody required; warrant; sheriff to take subject into custody until hearing; duties.
83-1029. Subject admitted by warrant; evaluated; decision.
83-1030. Subject in custody by warrant; preliminary hearing; final hearing; when held.
83-1031. Final hearing; not held within five days; preliminary hearing; purpose; mental health board; duties.
83-1032. Mental health board; preliminary hearing;

subject not a mentally ill dangerous person; dismiss petition and discharge subject; subject is a mentally ill dangerous person; voluntary treatment alternative; when; procedure.
83-1033. Mental health board; preliminary hearing; subject is a mentally ill dangerous person; order; final hearing.
83-1034. Board; order subject retained in custody or released pending final hearing; when held.
83-1035. Final hearing; purpose; mental health board; duties.
83-1036. Final hearing; subject denies allegations of petition; proceedings; suspension of proceedings; voluntary treatment alternatives; procedure.
83-1037. Mental health board; final hearing; determination that subject is a mentally ill dangerous person; order of final disposition.
83-1038. Mental health board; final disposition; considerations.
83-1039. Subject in need of board ordered treatment; custody pending entry of an order of final disposition.
83-1040. Subject in need of board ordered treatment; determine best treatment disposition; predisposition investigation; report and recommendations; predisposition assistance; psychiatric and psychological evaluation.
83-1041. Subject in need of board ordered treatment; board; issue warrant; contents; commitment; when completed.
83-1042. Involuntary treatment requiring confinement; subject taken to facility; procedure.

83-1043. Final order of mental health board; appeal; final order of district court; appeal.
83-1044. Final order of disposition; designate individual to prepare and supervise an individualized treatment plan; contents; copy; filed.
83-1045. Person responsible for subject's individualized treatment plan; periodic progress reports; filed and served.
83-1046. Mental health board; order discharge or change treatment disposition; when.
83-1047. Rights subjects are entitled to during proceedings against them; sections enumerated.
83-1048. Subject's rights; written notice of the time and place of hearings; reasons alleged for board ordered treatment; procedure.
83-1049. Subject's rights; representation by counsel; appointment of counsel if indigent.
83-1050. Appointment of counsel; procedure.
83-1051. Appointed counsel; fees; reimbursement of costs incurred; procedure.
83-1052. Subject's rights; independent evaluation and assistance in proceedings; fee and expenses.
83-1053. Counsel for subject; rights, enumerated; discovery; appeal from denial of discovery; when.
83-1054. Continuances; liberally granted.
83-1055. Mental health board hearings; closed to public; exception; where conducted.
83-1056. Subject's rights; preliminary and final hearings; appeal in person and testify in own behalf; present witnesses and evidence.
83-1057. Subject's rights; compulsory process to obtain

testimony of witnesses.
83-1058. Subject's rights; preliminary and final hearings; confront and cross-examine adverse witnesses and evidence.
83-1059. Preliminary, final, and judicial hearings; rules of evidence applicable.
83-1060. Subject's rights; written statements; contents.
83-1061. Proceedings shall be of record; reporter; expenses and fees.
83-1062. Qualified mental health professional; provide medical treatment to subject; when.
83-1063. Subject acquitted of liability in criminal proceeding; use of evidence.
83-1064. Subject; waive rights; manner.
83-1065. Rights of subjects in custody or receiving treatment.
83-1066. Subjects in custody or receiving treatment; rights; enumerated.
83-1067. Subjects in custody or receiving treatment; waive or consent to denial of rights; manner.
83-1068. Subject's records; confidential; exceptions.
83-1069. Violations; penalty.
83-1070. State Board of Mental Health; created; members; qualifications; chairperson.
83-1071. State Board of Mental Health; compensation; expenses.
83-1072. State Board of Mental Health; provide rehearings for persons involuntarily committed; where held; when.
83-1073. Rehearings; three members present.
83-1074. State Board of Mental Health; rehearings; what considered; procedure.
83-1075. State Board of Mental Health; rehearing;

Attorney General; powers, duties, and responsibilities.
83-1076. State Board of Mental Health; determine if subject is indigent; provide for appointment of counsel.
83-1077. State Board of Mental Health; cease to exist; when.
83-1078. Act, how cited.

QUESTIONS PRESENTED FOR REVIEW

A. Whether a prisoner sentenced to the Department of Correctional Services, who has never been judicially determined to be mentally ill, may be involuntarily transferred to a state mental hospital under the Department of Public Institutions without the benefits of procedural due process, when such transfer will submit him to chemotherapy, behavior modification programs and the stigmatization of being labelled mentally ill.

B. Assuming process is due prisoners who are to be involuntarily transferred to state mental hospitals, does the unique nature of this transfer afford the accused the availability of legal counsel.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343(3) and (4), 28 U.S.C. §2201 and 28 U.S.C. §2202. The action was originally brought by plaintiff Charles Miller and was certified as a class action on August 18, 1976. Following a hearing, the action was decertified, and Larry D. Jones, William George Foote, and

William McKinley Hines were added as individual plaintiff-intervenors on their motions. (Memorandum of Decision, Jurisdictional Statement, App. 4). Plaintiffs claimed that their involuntary transfers from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center pursuant to *Neb. Rev. Stat.* §83-180 were unconstitutional, in that the statutory scheme deprived them of due process of law and the equal protection of the laws (App. 10, 11, 12, 13, 21, 22, 23). Pursuant to a memorandum of decision and order entered on September 12, 1977, and a judgment entered on October 14, 1977, a three-judge court of the United States District Court for the District of Nebraska declared *Neb. Rev. Stat.* §83-180(1) to be unconstitutional in violation of the Due Process Clause of the fourteenth amendment to the United States Constitution. The court found lawsuit moot as to all plaintiffs and intervenors other than Larry D. Jones. (Memorandum of Decision, Jurisdictional Statement, App. 4)

Plaintiff-intervenor Larry D. Jones (appellee) was convicted of the crime of robbery and sentenced to the Nebraska Penal and Correctional Complex for a term of three to nine years from the District Court of Douglas County, Nebraska (App. 18, R.73). He began serving his sentence by assignment to the reception-diagnostic center at the Nebraska Penal and Correctional Complex for thirty days (R. 73). He was then transferred to the Nebraska State Reformatory, a division of the Nebraska Department of Correctional Services, where he remained from June of 1974 until January of 1975 (R.73, 74). He was then transferred to the Penal Complex penitentiary hospital and, after an incident, was transferred two days later to the area of solitary confinement known as the adjustment center (R. 74). While in the adjustment center, in an attempt to move himself to the

penitentiary hospital, he set his mattress on fire (R. 74, 75). While waiting for the guard to arrive he was severely burned, and he was transferred by ambulance from the Nebraska Penal Complex to St. Elizabeth's Hospital in the city of Lincoln, where he remained for about four or five months (R. 75, 112, 113). From the St. Elizabeth's Hospital he was involuntarily transferred pursuant to *Neb. Rev. Stat.* §83-180(1) to the security unit of the Lincoln Regional Center. (R. 76-78).

The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions (App. 16, R. 58). Its purpose is for the treatment of the emotionally disburbed, mentally ill, mentally diseased, and those suffering from mental defects (App. 16). All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal and Correctional Complex and the Nebraska State Reformatory to the Lincoln Regional Center are confined at the security building, which is the institution's maximum security facility (App. 16, R. 37). The Nebraska Penal and Correctional Complex is under the Department of Correctional Services. Both the Department of Public Institutions and the Department of Correctional Services are executive departments of the State of Nebraska, and their directors are both appointed by the Governor of the State of Nebraska (R. 58, *Neb. Rev. Stats.* § §81-101-102 [Reissue 1976]).

The statute found unconstitutional by the lower court, *Neb. Rev. Stat.* §83-101(1), provides in part that if a physician or psychologist designated by the Director of Corrections finds that a person suffering from a mental disease or defect cannot be given proper treatment in the facility in which he is so confined, the person may be segregated from other persons in that facility. If the physician or psychologist is of the opinion that the person cannot be

given proper treatment in that facility, then the director may arrange for his transfer for examination, study, and treatment to any other medical-correctional facility or to another institution in the Department of Public Institutions where proper treatment is available.

Neb. Rev. Stat. §83-173 (Reissue 1976) (Reissue 1976) allows the Director of Correctional Services to designate the place of confinement of persons committed to that department.

Neb. Rev. Stat. §83-176 (Reissue 1976) provides that whenever a person is sentenced or committed to a specific facility within the Department of Correctional Services he shall be deemed to be sentenced to that department. The director may designate as a place of confinement any available and suitable institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another.

The lower court enjoined the defendants from transferring plaintiff-intervenor Larry D. Jones from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center until his complete discharge from the custody of the State of Nebraska on the criminal sentence he is now serving, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
D. An independent decisionmaker;
E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
G. Effective and timely notice of all the foregoing rights.

(Jurisdictional Statement, App. 12-13)

While this cause was on appeal to the United States Supreme Court, Larry D. Jones was granted a limited parole to receive in-patient psychiatric treatment at the Veterans Hospital in Danville, Illinois. In light of this fact, and the possibility that Jones might be voluntarily accepting psychiatric treatment, the United States Supreme Court remanded the case to the United States District Court for consideration of the question of mootness. (*Vitek v. Miller*, 436 U.S. 407, (1978)).

On October 27, 1978, a three-judge district court found the case was not moot, because Jones, although not presently incarcerated in a mental hospital, was subject to and under a threat of being transferred to one, pursuant to *Neb. Rev. Stat.* §83-180. (Jurisdictional Statement, Exhibit E, App. 20, 24) The court therefore entered an order reinstating the original judgment of the court. (Jurisdictional Statement, Exhibit D, App. 18)

Larry D. Jones, is presently residing in the Nebraska Penal and Correctional Complex having been arrested in Arizona in November of 1978, on a Parole Board Warrant issued October 4, 1978. His parole was revoked by the Nebraska Parole Board after a final hearing on January 8, 1979 (Jurisdictional Statement, Exhibit H, App. 32). He

does not reside in the psychiatric unit of the Nebraska Penal and Correctional Complex, nor is he receiving or accepting psychiatric treatment.

SUMMARY OF THE ARGUMENT

I.

An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable from an involuntary transfer from one prison to another. The state has rested much of its case on the holdings of *Meachum v. Fano*, 427 U.S. 215 and *Montanye v. Haymes*, 427 U.S. 236. These cases are clearly distinguishable from the case at hand. *Meachum, supra*, involved the transfer of inmates from a medium security institution to a maximum security institution for disciplinary reasons. *Montanye, supra*, involved the transfer of an inmate from one maximum security unit to another. Here the plaintiff was transferred from a penal and correctional complex to a state mental hospital.

The plaintiff maintains that he possesses a protected liberty interest in not being arbitrarily transferred to a state mental hospital, and the uniqueness of the transfer alone makes it difficult to categorize within the limited framework of the *Meachum* and *Montanye* decisions. Assuming that the cases can be read so broadly as to encompass the factual situation at hand, it would clearly fall within the recognized exception in *Meachum*. The court below found there was an objective expectation rooted in state law and official prison practice, that such transfers would not occur except when an inmate becomes mentally ill and could not be treated at the prison. (Memorandum of Decision, Jurisdictional State-

ment, App. 7, 8). The state has argued that *Neb. Rev. Stat.* §83-180 (Reissue 1976) does not give the prisoner such an expectation rooted in state law. Yet the mere existence of a procedure outlined in the statute, found unconstitutional, does not guarantee that the procedure is not subject to constitutional challenge.

The transfer from a prison to a state mental hospital cannot be categorized as merely an administrative transfer. *Baxstrom v. Herold*, 383 U.S. 107; *U.S. ex rel. Schuster v. Herold*, 410 F.2d. 1071 (2nd Cir. 1971); *Chesney v. Adams*, 377 F.Supp. 887 (D. Conn. 1974). The stigma that attaches to those confined and labelled mentally ill and the use of mandatory behavior modification and chemotherapy are the most important factors why such transfers are not simply administrative.

Transfer to a mental hospital certainly involves the risk of a loss of liberty which is even more fundamental and greater than the loss of parole, good-time, probation, or transfer to solitary confinement.

The court below upon finding that due process attached to the plaintiff's liberty interest, properly used the analytical framework set out by this Court in *Matthews v. Eldridge*, 424 U.S. 19 (1976). The plaintiff's private interest was found to be the avoidance of a more controlled environment and being labelled mentally ill, which carries a distinctive stigma. The risk of an erroneous deprivation was relatively high because of the limited statutory safeguards.

The state failed to make a showing of how any additional hearing procedure would create an additional administrative or fiscal burden.

II.

The plaintiff clearly has a protected private liberty interest in the avoidance of being stigmatized mentally ill and subjected to chemotherapy and behavior modification programs. Even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid conviction, an individual does possess a residuum of constitutionally protected liberty. This Court noted in *O'Connor v. Donaldson*, 422 U.S. 579, that involuntary confinement to a mental hospital is a deprivation of liberty to which due process attaches. This Court in *Baxstrom, supra*, and other courts in *Schuster* and *Chesney, supra*, would not have invalidated involuntary criminal commitment schemes using an equal protection analysis, had not a protected liberty existed. Courts have increasingly recognized that a stigma attaches to those confined in mental institutions, which follows a person throughout his life, regardless of the duration of the confinement. The court below properly recognized that a transfer to the Lincoln Regional Center resulted in greater limitation of freedom, had stigmatizing consequences, and, coupled with mandatory behavior modification, resulted in a major change of confinement tantamount to a grievous loss. (Memorandum of Decision, Jurisdictional Statement, App. 8).

The decision of the court below requiring minimal due process for transfer to a state mental hospital does not take medical decisions away from health professionals as is argued by the state. The hearings contemplated will undoubtedly involve the testimony of health professionals, whose credibility will be weighed by the trier of fact. Involuntary treatment for mental illness is also distinguishable from routine medical treatment because of the stigmatizing consequences and the uncertainties which accompany psychiatric diagnosis and therapy.

The National Advisory Commission on Criminal Justice Standards and Goals advocates detailed procedural safeguards for transfers between correctional and mental instituiuons. *Corrections,* Standards 2.13, 16.12.

III.

In addition to minimal due process requirements, an inmate involuntarily transferred to a state mental institution must be afforded the right to counsel because of the uniqueness of the disabilities which accompany the mentally ill. Unless an individual is able to comprehend, examine, evaluate, and challenge the process that he is afforded, it is of little or no consequence. As the lower court noted, a prisoner's rights unless known are rather illusionary. (Memorandum of Decision, Jurisdictional Statement, App. 12).

ARGUMENT

I.

AN INVOLUNTARY TRANSFER OF A PRISONER FROM A CORRECTIONAL COMPLEX TO A STATE MENTAL HOSPITAL IS CLEARLY DISTINGUISHABLE FROM AN INVOLUNTARY TRANSFER FROM ONE PRISON TO ANOTHER.

Larry D. Jones was involuntarily transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, a state mental hospital. He had never been adjudged insane or incompetent by any court nor had he ever been brought before a mental health commitment board of the State of Nebraska or any state (R. 76). Once transferred he was forced to take Thorazine, his prescribed medication (R. 79). When he refused, he was injected with the medication, taken to a quiet room, and placed in waist restraints (R. 81). He was also placed on a behavior modification program, which was also involuntary (R. 89, 38-41). In all respects this was not a mere transfer from one part of a correctional system to another. The findings of the court below were in accord, ". . . Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs, and to take whatever medication may be prescribed for them. . . ." (Memorandum of Decision, Jurisdictional Statement, App. 6).

Appellants have rested much of their case on the decisions of *Meachum v. Fano,* 427 U.S. 215, and *Montanye v. Haymes,* 427 U.S. 236. The strict and limited holdings of the courts are found in *Montanye, supra* at 242:

> We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly conficted prison inmate is infringed when he is transferred from one *prison to another* within the state, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. [Emphasis added]

Both cases cited by the appellant in support of their claim that no due process violation existed in the instant case,

involved factual situations that are distinguishable from the case at hand. *Meachum* involved the transfer of inmates from a medium security institution to a maximum security institution as disciplinary action for setting fires. *Montanye,* the companion case, involved the transfer of an inmate from one maximum security correctional facility to another maximum security correctional facility in a different location, allegedly because the inmate had circulated a petition protesting his removal from a prison job. In the case now before this Court, we are faced with an entirely different transfer scheme, the transfer from a penal and correctional complex to a state mental hospital. The state transfer statute challenged in *Meachum* did not deal with transfers from a state prison to a state mental hospital but provided only that:

> §97 Transfers *From* and *To* Correctional Institutions.
>
> Approval.
>
> The Commissioner may transfer any sentenced prisoner from one *correctional institution* of the commonwealth to *another,* and with the approval of the sheriff of the county from any such institution except a prisoner serving a Life Sentence to any *jail* or *house of correction* or a sentenced prisoner from any *jail* or *house of correction* to any *such institution* except the state prison, or from any *jail* or *house of correction. . . . Mass. Gen. L. Annot.* §97 (1974) cited in *Meachum, supra.* p. 227 Foot. 7 [Emphasis added]

Clearly, the statute dealt only with transfers between correctional facilities. These cases might be controlling if an involuntary inmate transfer from the Nebraska State Reformatory to the Nebaska Penal and Correctional Complex were being challenged. The court below specifically found that, ". . . Inmates are not assigned to the Lincoln Regional

Center for any administrative or correctional purpose. . . ." (Memorandum Opinion, Jurisdictional Statement, App. 7).

It is our contention that the liberty interest a prisoner maintains from arbitrary transfer to a state mental hospital is so unique that it is difficult to categorize within the limited framework of the *Meachum* and *Montanye* decisions. To find the statute in question unconstitutional, we therefore do not feel it necessary to come within the recognized exceptions noted in these cases. But assuming arguendo that these opinions can be read so broadly, so as to encompass the factual situation in the case at hand, we would agree with the court below that a prisoner has a justifiable expectation rooted in state law and Penal Complex practice, that he will not be transferred to a state mental hospital unless he is mentally ill and cannot be adequately treated at the Penal Complex.

The court below found that the transfers to the Lincoln Regional Center were conditioned upon a finding that a prisoner suffered from a mental disease or defect and could not be adequately treated within the Penal Complex (R. 8, 9, 10) (Memorandum Opinion, Jurisdictional Statement App. 7). The court also went on to state that ". . . the statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that the transfers to the Lincoln Regional Center are so conditioned in practice." (Memorandum of Opinion, Jurisdictional Statement App. 7).

Larry Jones clearly had an expectation firmly fixed in state law coupled with Penal Complex practice that he would not be transferred to a state mental hospital unless he became mentally ill, and he could not be treated at the Penal Complex. The fact that the statute helps give the prisoner the expectation rooted in state law that he will not be transferred

to a mental hospital unless mentally ill and could not be treated at the prison, does not exclude the possibility that the statute's procedure for transferring the prisoner is unconstitutional, for its failure to meet minimal due process requirements.

There exists additional precedent for the proposition that right to a hearing compatible with due process standards is strongly rooted in Nebraska state law, although in the civil context. *Doremus v. Farrell,* 407 F. Supp. 509 (U.S.D.C. Neb. 1975); *The Nebraska Mental Health Commitment Act Neb. Rev. Stats.* §§83-1001-1078.

The state argues that the mere existence of *Neb. Rev. Stat.* §83-180(1) and its questionable transfer procedures gives a prisoner an expectation that he will be transferred according to its stated procedures. The mere reading of the procedures outlined in the statutes does not leave open the possibility of constitutional challenge to the procedural aspects of the statute, once it has raised expectation in the prisoner that he will not be transferred unless mentally ill. The mere existence of *Neb. Rev. Stat.* §83-180(1) would seem to indicate that the transfer to a state mental hospital, because of the tremendous liberty interest involved, requires closer scrutiny. Otherwise, why would not the state effectuate such transfers pursuant to *Neb. Rev. Stat.* §83-176 (Reissue 1976)?

The limited holding reached in *Meachum* was based in part on the decision of this Court not to place the Due Process Clause ". . . astride the day to day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum, supra,* p. 228, 229. It is our contention that an involuntary transfer to a state mental hospital is not merely an administrative matter nor a discretionary de-

cision, regardless of the fact that a physician or psychologist may make the decision. This Court in the case of *Baxstrom v. Herold*, 383 U.S. 107 (1966) stated that such transfers could not be categorized simply as administrative transfers:

> . . . This statutory classification cannot be justified by the contention that Dannemora [state hospital] is substantially similar to other mental hospitals in the state, and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. . . . *Baxstrom, supra*, p. 113.

Other courts have recognized that the differences in the two types of incarceration (prison-mental hospital) ". . . are simply too great to treat the transfer to a mental hospital as a routine administrative procedure. The consequences of a mistake are sufficiently great to warrant giving prisoners the same protection as non-prisoners receive. . ." *Matthews v. Hardy*, 420 F.2d. 607, 611 (1969).

Perhaps the most significant reason why transfers from a penitentiary to a mental hospital involve a great deal more than a normal prison administrative transfer is that an individual mistakenly placed in a mental hospital may suffer severe emotional or psychic harm. The common use of chemotherapy in mental hospitals can contribute to the disturbing possibility that one mistakenly confined in a mental institution may actually become mentally ill. Mental patients are forced to endure added frustration, hardships and restrictions to which typical prisoners are not exposed (R. 80-99). See also *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969).

In *Chesney v. Adams*, 377 F.Supp. 887 (1974) a prisoner challenged the constitutionality of the procedure used to transfer him from the Connecticut Correctional Institution to the Security Treatment Center, contending that the state in

question allowed for his transfer without a hearing, which was afforded to non-prisoners. The court in finding the state statute unconstitutional noted that the disparity in procedural safeguards afforded prisoners relevant to the smooth functioning of the prison or discipline of prisoners does not allow for justification for labeling such a transfer an administrative matter. *Chesney, supra*, p. 894.

The court below took note of the greater limitations of freedom of action at the Lincoln Regional Center, the fact that a transfer there has stigmatizing consequences and that the use of mandatory behavior modification technique all combine to make a transfer there tantamount to a major change in the condition of confinement amounting to a grievous loss. (Memorandum Opinion, Jurisdictional Statement, App. 8)

The state has argued that the prisoner failed to prove that the statute (§83-180) was not followed and that any right by virtue of the statute was given to the prisoner. The initial complaints filed by the plaintiffs and intervenors clearly indicate that we agree that the statutory procedure for transfer was followed, but challenge its constitutionality on its face and as applied. (App. 7, 8, 12, 13, 18, 19, 21, 22, 23).

This Court has held that due process attaches in a number of cases which have been cited in the brief of the state: *Morrissey v. Brewer*, 408 U.S. 471 (parole); *Gagnon v. Scarpelli*, 411 U.S. 778 (probation); *Wolff v. McDonnell*, 418 U.S. 539 (good time). These cases deal generally with grants of liberty which were affirmatively conferred by state law. Common sense would seem to dictate that the freedom from being involuntarily placed in a mental institution is a much more *fundamental* liberty than loss of good time, probation or parole. Even though the loss of one's parole may cause the interruption of one's life, one is free to be paroled

again. Even though one may lose his preferred status of probation, he may once again regain it, as in the case of good time. But once someone is transferred involuntarily to a state mental hospital, the stigma does not leave. Nor do the affects, or side affects, of chemotherapy necessarily leave once the individual is free again. And one mistakenly labelled mentally ill, who remains so confined for a long duration, may actually become mentally ill. And certainly transfer to a mental hospital involves more of a loss of liberty than transfer to maximum security and solitary confinement. See *Wolff, supra,* at 571-72 n. 19; *Enomoto v. Wright,* Aff. w/o opinion 1978, 434 U.S. 1052 (1978).

The court below, having realized that a substantial "liberty interest" was involved, chose to use the analytical framework set out by this Court in the case of *Matthews v. Eldridge,* 424 U.S. 319, 334, 335 (1976) which suggested:

> [O]ur prior decisions indicate that identification of the specific interest dictates of due process gnerally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirements would entail. See, *e.g., Goldberg v. Kelly, supra* at 263-271. See also (Memorandum of Decision, Jurisdictional Statement, App. 8).

The first factor, the private interest of not being transferred to a state mental hospital, is different from the interests in *Meachum, Montanye,* or *Wolff.* Here the prisoner has greater private interest because of the stigmatizing affects of

being placed with the mentally ill and being labelled mentally ill. Also, the interest is greater because the prisoner, after the transfer, may be subject to the behavior modification programs which include the use of chemotherapy.

Secondly, the risk of an erroneous deprivation of the private interest was found by the lower court to be high, since the statute allows transfer of the prisoner based on the opinion of only one physician or psychologist. This is the only safeguard, and the transferee often is unable to challenge or understand the conclusions of the physician. The risk may be even higher when a prisoner is transferred on the opinion of a medical physician who may not even have training in psychology or psychiatry. The record of the proceedings below indicates that an even higher risk may be involved as oftentimes there is a delay in the return of the prisoner to the Penal Complex after he has been treated and cured at the Regional Center (R. 172-173). In the case of intervenor William George Foote the delay was four weeks (R. 173).

In evaluating the state's interest the lower court found:

> Swiftness does not appear to be a major need in view of the availability at the Penal Complex of physical security, some psychiatric and psychological staff and a hospital. Hazards of calling witnesses at a hearing either within or outside the Penal Complex, whether those witnesses are prisoners or non-prisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined. Usually, the witnesses in a mental hearing will be nonprisoners. (Memorandum of Decision, Jurisdictional Statement, App. 9, 10,)

Additionally, the state failed to make a showing of how additional procedures prior to involuntary transfer mandated

by the court below would create an additional administrative or fiscal burden. The record is totally absent on this point.

As a practical matter there are probably relatively few individuals who contest their transfers. The Department of Correctional Services in Nebraska could use its hearing officer which it hired to conduct parole revocation hearings after this Court's decision in *Wolff, supra.* It would, therefore, seem that no additional burden is or has been placed on the state because of the mandate of the lower court.

II.

A PRISONER HAS A PROTECTED LIBERTY INTEREST IN THE AVOIDANCE OF BEING STIGMATIZED MENTALLY ILL AND SUBJECTED TO CHEMOTHERAPY AND BEHAVIOR MODIFICATION PROGRAMS.

The fourteenth amendment prohibits any state from depriving a person of life, liberty, or property without due process of law. The state has attempted to define "liberty" as only those rights which the state chooses to grant. If this were the case, the only objective expectation that a prisoner would have in not being arbitrarily transferred to a mental institution would be that which the state arbitrarily chooses to give to him. This is a rather jaundiced approach to the common understanding of the concept of liberty in a non-totalitarian state. We contend that even though a prisoner may give up some liberty when he is incarcerated pursuant to a valid conviction, an individual does possess a residuum of constitutionally protected liberty. Mr. Justice Stevens in the dissent of *Meachum* in his discussion of *Morrissey v.*

Brewer, 408 U.S. 471, aptly characterized this concept:

> . . . For if an inmate's protected liberty interests are no greater than the State chooses to allow, he is really no more than the slave described in the Nineteenth Century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore. *Meachum, supra,* p. 233.

See Also, Manoghan, *Of "Liberty" and "Property",* 62 Cornell L. Rev. (1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Proces in the Administrative State,* 62 Cornell L. Rev. 445 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976)

To carry the state's argument to its logical absurdity, by virtue of *Neb. Rev. Stats.* § §83-176-180, the Director of Correctional Services may place an inmate anywhere he wishes and for however long he wishes. If the Department of Public Institutions happens to operate a mental hospital using electroshock therapy or homes for the retarded, an inmate has no liberty interest whatsoever in not being transferred there. And the Constitution of the United States affords him no protection, because the statutory scheme has created no justifiable expectation that he will not be so transferred. Rather, a prisoner has a constitutionally protected liberty interest in the avoidance of transfer to a mental hospital regardless of where he was transferred from. This Court has recently noted in the case of *O'Connor v. Donaldson,* 422 U.S. 579 (Burger, concurring opinion):

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. *Specht v. Patterson,* 386 U.S. 605, 608, 87 S.

> Ct. 1209, 1211, 18 L. Ed. 2d. 326 (1967). *In Re Gault,* 387 U.S. 1, 12-13, 87 S. Ct. 1428, 1435-1436, 18 L. Ed. 2d. 527 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. . . .

This Court in the case of *Baxstrom v. Herold,* 383 U.S. 107, dealt with a situation in which a prisoner nearing the end of his prison term was committed to a mental hospital, but under a New York statute did not have the option of jury review on the issue of insanity, which all other persons civilly committed possessed. The Court invalidated the procedure, using an equal protection analysis. The case clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the fourteenth amendment, arbitrarily withhold it from a class of people. Although the case was decided on equal protection grounds, the Court would not have so found unless there existed a fundamental constitutionally protected liberty, that the prisoner Baxstrom possessed in not being involuntarily committed to a mental hospital.

Lower courts have followed the *Baxstrom* decision that a non-prisoner has a liberty interest in not being involuntarily transferred to a state mental hospital. In the case of *United States ex rel. Schuster v. Herold,* 410 F.2d. 1071 (2nd Cir. 1969) a factual situation existed almost identical to the case at hand, as a prisoner was transferred to a state mental hospital, which was more restrictive than the prison. Also using an equal protection analysis, the court determined that a classification scheme existed, and that there was no rational basis behind the scheme for treating prisoners differently. The court held that before a prisoner may be transferred to the state mental hospital he was entitled to the

same procedures as those afforded to non-prisoners when they are involuntarily transferred to a mental hospital. *Schuster, supra,* p. 1084. The court would not have so held had they not felt that a liberty interest was retained by prisoners and non-prisoners alike. The court focused on the severe restrictions placed on the criminally insane and indicated that such transfers were not merely administrative matters. *Schuster, supra,* p. 1078. Even more important, the court recognized the dangers to such transfers when minimal procedural rights are afforded:

> In considering the problem posed, we are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad, but dangerously so, . . . Confined with those who are insane, told repeatedly that he too is insane, and indeed treated as insane, it does not take much for a man to question his own sanity and in the end sucumb to some mental aberration. *Schuster, supra,* p. 1078.

The court in *Schuster* as in the case of *Matthews v. Hardy,* 420 F.2d. 607 (1969) focused upon the fact that a stigma is attached to the mentally ill which is different from that attached to the criminal class in general. The court in *Chesney v. Adams,* 377 F. Supp. 887, 893 (D. Conn. 1974) in a substantially similar case relying upon *Matthews* and *Schuster* pointed out that a mental hospital commitment can have great effects on ". . . job possibilities and personal associations." Even if a prisoner is released after a short period of time, for what is commonly referred to as "evaluation and treatment," the damage done may be the stigma imprinted, regardless of the duration of the confinement. Additionally, a mental health commitment on one's record may result in:

. . . State constitutional and statutory restrictions on voting rights; restrictions on one's right to serve on a federal jury; restrictions on one's ability to obtain a driver's license; and limitations on his access to a gun license. Moreover, it is still commonly held that an adjudication of mental incompetency gives rise to a rebuttable presumption of continued incompetency. In many jurisdictions such a presumption may in turn affect the right to dispose of property, to execute contracts and to perform many similar and commonplace functions. Indeed, such an adjudication, while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system. Such evidence will frequently be revived to attack the capacity of a trial witness. Depending upon the diagnosis, it may be admissible for impeachment purposes. Indeed, even in a criminal trial, it may be available to attack the character of a defendant, if he has put his character in issue. Most significantly, records of commitments to a mental hospital will certainly be used in any subsequent proceedings for civil commitment. *In Re Ballay,* 482 F.2d. 648, 651, 652 (D.C. Cir. 1973)

In the recent case of *Addington v. Texas,* 60 L.Ed. 323 2d. (1979) this court held that an individual's interest in the outcome of a civil commitment proceeding is of such weight that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. *Id.* at 332

This court recognized that involuntary commitment to a mental hospital has a lasting, significant impact on an individual.

. . . it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this

phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual. *Id.* at 330.

The court below properly recognized that a transfer to the Lincoln Regional Center results in greater limitations on freedom of action, has stigmatizing consequences, and that coupled with mandatory behavior modification, results in a major change of confinement tantamount to a grievous loss (Memorandum of Decision, Jurisdictional Statement, App. 8)

The patients at the Lincoln Regional Center are not allowed to keep the following items in their cells:

1. Matches (R. 41)
2. Cigarettes (R. 82)
3. Cigarette lighters (R. 82)
4. Shaving razors (R. 82)
5. Nail clippers (R. 82)
6. Magazines (R. 42) (S-5 only)
7. Shoes (R. 83, 42-43) (S-5 only)
8. Stereos (R. 43)
9. Radios (R. 43)
10. Televisions (R. 43)
11. Food (R. 82)
12. Books (R. 43, 83, 94-95)
13. Pen (R. 83)
14. Pencils (R. 83)
15. Writing paraphernalia (R. 43)
16. Glass articles (R. 43)
17. Gum (R. 41, 42, 82)
18. Belt (R. 83)
19. Musical instruments (R. 137)
20. Painting materials (R. 96)

21. Ash trays (R. 43)

These articles may be kept by prisoners in their cells at the Nebraska Penal and Correctional Complex (R. 12, 13, 14, 83, 132).

Most of the articles may not be carried by the patients on their person at the Lincoln Regional Center Security Building, while the same prohibition does not exist at the Nebraska Penal and Correctional Complex (R. 17, 18, 20, 21, 44, 82, 83).

At the Lincoln Regional Center Security Building the patients suffer the following additional losses of freedom which are not denied the inmates at the Nebraska Penal and Correctional Complex:

A. Must be accompanied by guards or security technicians when they leave the ward.
B. Are allowed only four sets of clothing
C. Are not allowed to earn money by working on the ward.
D. Are not eligible for work-release programs.
E. Are not eligible for work-training programs, including carpentry, welding, drafting, metal manufacturing, automative body repair, and other vocational skills.
F. Are forced to take afternoon naps.
G. Are not allowed daily access to the gym, weight-rooms, and the outdoors.
H. Are sometimes punished by means of leg, waist, and bed restraints.
I. Are punished for aggressive behavior by being given drugs to subdue them.
J. May not chew gum.
K. Are subject to time restrictions for smoking.
L. Are forced to do unpaid ward work in addition to mopping, sweeping, and buffing the floors and halls.

M. Are limited in the number of organized sports.
N. Have a definite time at which they must go to bed.
O. Are given virtually no outside entertainment.
P. Are not allowed to keep or play instruments in their rooms, form bands, or listen to those who have formed bands.
Q. Are not allowed to paint in their rooms or to have access to an art club and an art display where they might sell their artwork.
R. Have their silverware individually counted, handed to them, and individually taken away from them at mealtime.
S. Have no access to high school equivalency courses, correspondence courses, or educational-release programs at local universities.
T. Are not allowed access to a law library.

(R. 11-24, 38-52, 80-99, 128-140).

The record clearly indicates that treatment and confinement at the Lincoln Regional Center Security Building is much more restrictive than the confinement at the Nebraska Penal and Correctional Complex. The obvious reason for the differences is that the Lincoln Regional Center is a mental hospital employing a restrictive behavior modification program, and the Nebraska Penal and Correctional Complex is a prison facility which is designed to confine prisoners, not treat mental illness.

The most important difference between the two institutions is the fact that inmates at the Penal Complex are not forced to take medication and chemotherapy, while the same is mandatory at the Lincoln Regional Center Security Building (R. 79, 80, 128, 129). For this reason standing alone, this Court should find that a prisoner has a "liberty interest" for which he must be afforded due process before

transfer to a state mental hospital. The common use of chemotherapy on prisoners for even a short period of time may have unknown side effects and may in effect contribute significantly to the possibility that one mistakenly confined may become mentally ill. The lower court was correct in finding that the risk of an erroneous deprivation of the prisoners' private interests was high, considering the minimal safeguards afforded by *Neb. Rev. Stat.* §83-180(1) (Reissue 1976).

The state has argued that the responsibility for the determination of the need for psychiatric care is properly placed with the health care professionals alone. They have sought to characterize the lower court's decision as one which takes away the decision from health care professionals and gives it to the attorneys and judges. The state has failed to point out that the procedural safeguards set down by the court below contemplate a hearing in which the testimony of health care professionals will be heard. The safeguards allow the prisoner the opportunity to call independent mental health professionals, who may agree or disagree with those called by the state. Although the independent decisionmaker himself may not be a health care professional, his decision will surely be based on the testimony of other health care professionals, whose creditibility will be weighed by the trier of fact. This Court in *O'Connor v. Donaldson*, 422 U.S. 563, 579 (1975) (Burger, concurring) noted:

> The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are complete with evidence of the divergence of medical opinion in this vexing area. *E.g. Greenwood v. United States*, 350 U.S. 366, 375....See also *Drope v. Missouri*, 420 U.S. 162 . . . (1975).

See also, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974). *Addington v. Texas, Supra* at 333, 4.

Under the statute held unconstitutional by the court below, the transfer of a prisoner may be made to a mental hospital on the testimony of a physician alone, who has had no psychiatric training.

The appellants have sought to characterize the transfer of a prisoner to a state mental hospital as no different from a transfer to a medical hospital. Obviously, there is a grave difference. The prisoner sent to a hospital has a right to refuse the treatment if for no other reason than religious beliefs. Rarely would a prisoner refuse such medical treatment as many lawsuits are brought in state and federal courts seeking to force state prison officials to provide adequate medical care. If a prisoner is sent to a hospital for an operation and is returned to the prison population, this carries no stigma whatsoever. On the other hand, transfer to a state mental hospital carries with it a definite stigma. Some prisoners may not like being placed with and forced to associate with those that suffer from mental defects. In an open ward, as was characterized in the case before us, it may be substantially more dangerous than the normal prison environment. There might also be a presumption that a patient is mentally ill if his sentence expires and he is still confined at the Lincoln Regional Center, which might induce a local prosecutor to bring him before a mental health commitment board. The parole board, looking to his history of confinement in the mental hospital, might be less apt to release him to society. None of these factors, particularly the stigmatizing of the inmate, exists when he seeks and receives medical treatment.

The state has cited and quoted from two sets of Standards for correctional institutions, those of the National Advisory Commission on Criminal Justice (1973) and the Com-

mission on Accreditation for Corrections of the American Correctional Association (1977). These Standards are quoted and discussed to support three propositions: (1) That prison inmates should receive treatment for mental and emotional problems; (2) That these inmates should be transferred to the appropriate facilities where such treatment is available; and (3) That the determination of the need for such transfers should be made by health care professionals.

The Appellee does not in any way disagree with these policies or with the Standards quoted by the state. A prison inmate suffering from mental illness should be provided with treatment at an appropriate facility, and the determination as to their illness should be made by qualified mental health professionals. The Court should note, however, that the state has failed to quote a number of additional Standards which must be read with those that *were* quoted in order to provide the complete scheme contemplated by the Advisory Commission.

Standard 2.13, Procedures for Nondisciplinary Changes in Status of the National Advisory Commission on Criminal Justice, is as follows:

> Each correctional agency should immediately promulgate *written rules and regulations* to prescribe the procedures for determining and changing offender status, including classifications, *transfers,* and major changes or decisions on participation in treatment, education, and work programs within the same facility.
>
> 1. The regulations should:
>
> a. Specify criteria for the several classifications to which offenders may be assigned and the privileges and duties of persons in each class.
>
> b. Specify frequency of status reviews or the nature of events that prompt such review.

> c. Be made available to offenders who may be affected by them.
>
> d. Provide for notice to the offender when his status is being reviewed.
>
> e. Provide for participation of the offender in decisions affecting his program.
>
> 2. The offender should be permitted to make his views known regarding the classification, transfer, or program decision under consideration. The offender should have an opportunity to oppose or support proposed changes in status or to initiate a review of his status.
>
> 3. Where reviews involving substantially adverse changes in degree, type, location, or level of custody are conducted, an *administrative hearing should be held,* involving notice to the offender, an opportunity to be heard, and a written report by the correctional authority communicating the final outcome of the review. Where such actions, particularly transfers, must be made on an emergency basis, this procedure should be followed subsequent to the action. *In the case of transfers between correctional and mental institutions, whether or not maintained by the correctional authority, such procedures should include specified procedural safeguards available for new or initial commitments to the general population of such institutions.*
>
> 4. Proceedings for nondisciplinary changes of status should not be used to impose disciplinary sanctions or otherwise punish offenders for violations of rules of conduct or other misbehavior.
>
> (Emphasis added.)

Similarly, Standard 16.12, Commitment Legislation, provides:

Each state should enact. . . legislation governing the commitment, classification, and transfer of offenders sentenced to confinement. Such legislation should include:

5. Authorization for the transfer of offenders in need of specialized treatment to institutions that can provide it. This should include offenders suffering from physical defects or diseases, mental problems, narcotic addiction, or alcoholism.
7. *A requirement that the correctional agency develop through rules and regulations (a) criteria for the assignment of an offender to a particular facility and (b) a procedure allowing the offender to participate in and seek administrative review of decisions affecting his assignment or transfer to a particular facility or program.*

(Emphasis added.)

The Commentary following Standard 2.13 discusses the fact that transfers of the type involved in the case at hand may have serious effects upon a prison inmate's degree of liberty, access to correctional services, and the conditions of existence within the correctional system. The drafters cite *Baxstrom v. Herold,* 383 U.S. 107 (1966) and *U.S. ex rel. Schuster v. Herold,* 410 F.2d 1071 (2d Cir. 1969) to point out that the Courts *have* required procedural protections when inmates are transferred from prisons to mental hospitals. They express the view that the procedures outlined in their Standards must be complied with in order to prevent correctional agencies from exercising their discretionary powers in an arbitrary or capricious manner, as was possible pursuant to *Neb. Rev. Stat.* §83-180 (Reissue 1976).

Standard[s] [2;13] speak[s] to the discretionary power

which correctional agencies exercise over offenders and how that power is to be regulated and controlled. No system of individualized treatment can avoid discretionary power over those to be treated, but such power must be controlled in order to avoid arbitrary and capricious action. National Advisory Commission at 22.

A thorough and complete reading of the Advisory Commission's report indicates, therefore, that the experts in the correctional field have recognized the need for due process guarantees to be afforded a penitentiary inmate facing possible mental hospital commitment. The sections herein quoted make it clear that the drafters of the Standards were aware of the necessity of providing the same rights to persons facing mental hospital commitment from a penitentiary as those civily committed.

Interpretation of these Standards obviously does not suggest that a due process hearing prior to transfer is inappropriate or futile. Mental hospital commitment is by no means analagous to brain surgery. The distinctive stigma attached to mental illness has been recognized by the courts and its existence mandates that process is due.

III.

AN INMATE WHO IS TO BE INVOLUNTARILY TRANSFERRED TO A STATE MENTAL HOSPITAL MUST BE AFFORDED THE RIGHT TO COUNSEL IN ADDITION TO OTHER MINIMAL REQUIREMENTS OF DUE PROCESS.

The court below correctly held that availability of legal counsel, furnished by the state if the inmate is financially unable, must be afforded an inmate at a hearing on the issue of the necessity of his transfer to a mental hospital (Memorandum Opinion, Jurisdictional Statement, App. 12, 13).

The court stated:

> The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a non-prisoner in the same condition. The capability to examine, understand, evaluate, and challenge the process and the evidence is vital and there may be nobody available to do so, unless it be by counsel, furnished by the State if need be, because of indigency. The State's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals recognized in *Wolff v. McDonnell*, 418 U.S. at 567-570, are overshadowed by the disability which accompanies one who is mentally ill. It should be apparent that the prisoner's rights are largely illusionary, unless he knows those rights. (Memorandum Opinion, Jurisdictional Statement, App. 12, 13).

The court's reasoning is quite sound as it recognized the uniqueness of the disabilities which accompany the mentally ill. Additionally, oftentimes an inmate suffering mental illness who is to be involuntarily transferred will have already been placed on medication. If he is afforded all of the minimal requirements of due process set out in *Morrissey v. Brewer*, 408 U.S. 471 (1972), but not the availability of counsel, who will guarantee for him that he attends his hearing non-medicated? What purpose does it serve to grant minimal due process guarantees if the transferee cannot remember the hearing because he was overmedicated? Who will prevent the state from overmedicating each inmate who

wishes to contest his transfer to the state mental hospital? An overmedicated or medicated inmate may appear mentally ill to an independent decisionmaker, who may not be able to properly judge the affects unless presented to him by counsel.

How will an unrepresented inmate know that he is able to have an independent psychiatric evaluation unless told to him by counsel? An unrepresented prisoner might rely on the single diagnosis of the treating physician and psychologist, not realizing the uncertainties of psychiatric diagnosis.

In the case of *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wisc. 1972) the court found Wisconsin's civil commitment procedure unconstitutional, and required persons to be committed be given the opportunity for representation by counsel. The court based its holding on the reasoning used in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968) in which the court compared the situation of a mental deficient to the juvenile delinquency procedure involved in *In Re Gault*, 387 U.S. 1, (1967):

> [L]ike *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. *It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency.* It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that a subject of an involuntary commitment proceedings is afforded the opportunity to [have] the guiding hand of legal counsel at every step of the

proceedings, unless effectively waived by one authorized to act in his behalf.... *Heryford, supra* at 396. (Emphasis added.)

The court below properly found that the additional requirement of legal counsel is especially needed in the unique situation of transfer to a state mental hospital, because of the tremendous liberty interest involved.

Civil committees are afforded the right to counsel pursuant to *Neb. Rev. Stats.* §§83-1001-1078 in the State of Nebraska. Those who are to be criminally committed are in the same need of counsel to help cope with the problems and complexities of the law.

Equal Protection Considerations

The court below found that *Neb. Rev. Stat.* §83-108(1) (Reissue 1976) was unconstitutional because of due process infirmities, and did not expressly decide whether or not the procedure was constitutionally infirm using an equal protection analysis. We would agree with the court below that under an equal protection analysis the constitutional question of treating prisoners and non-prisoners in a different manner would depend upon a weighing of the factors discussed in the opinion below.

It is our contention, although not expressly reviewable by this Court, that the same result could have been reached by an equal protection analysis. We disagree with the state's attempt to distinguish *Baxstrom v. Herold*, 383 U.S. 107 (1966). *Baxstrom* clearly stands for the proposition that when a state establishes mental health commitment review procedures, it may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from a class of people. The only factual distinction is that the

plaintiff in *Baxstrom*, already having completed his prison sentence, was challenging his mental health commitment at its expiration, while the plaintiff here challenged his commitment at its inception. Lower courts have followed the analysis in *Baxstrom*, using an equal protection analysis in cases involving nearly identical factual situations to the case at hand. See *U.S. ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969); *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974); *Matthews v. Hardy*, 420 F.2d. 607 (1969).

Should this Court wish to find the statute in question unconstitutional using an equal protection analysis, we would contend that the present procedures for civil commitments, *Neb. Rev. Stats.* §§83-1001-1078, do not present an insurmountable hurdle for comparison purposes, because of their enactment after the plaintiff's transfer. Their effective date, April 6, 1976, was still prior to the decision rendered by the lower court on September 12, 1977.

CONCLUSION

The appellee respectfully moves the Court to affirm the judgment entered in this cause by the United States District Court for the District of Nebraska.

Respectfully submitted,

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